J))

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1266 of 1998

in

SPECIAL CIVIL APPLICATION No 7777 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

---

UNION OF INDIA

Versus

MOTILAL D KHATANA

---

Appearance:

MR JAYANT PATEL, SR COUNSEL with MR SS SHAH for Appellants

MR RV SAMPAT for Respondent No. 1

---

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 16/02/2000

ORAL JUDGEMENT (Per J.M. Panchal, J.):

1. This appeal by Union of India, through the Secretary, Ministry of Railways, New Delhi and two others, filed under clause 15 of the Letters Patent, is directed against judgment dated August 5, 1998, rendered by the learned Single Judge in Special Civil Application No. 7777 of 1988 by which order of punishment retiring the respondent from service compulsorily is quashed reserving liberty to the disciplinary authority to consider the question of imposition of minor or petty punishment and the respondent is reinstated in service with full backwages as well as consequential benefits.

2. The respondent was recruited as a Constable in the Railway Protection Force, which is a part of the Armed Forces of the Union of India. He was expected to report for duty on April 23, 1987 but, after reporting at the place of work, he obtained sick memo and remained absent in an unauthorised manner from duty on April 23, 1987. Again he reported sick to private doctor for 19 days but failed to make a request to the competent authority to sanction medical leave within 48 hours of his falling ill nor presented himself with a certificate in support of his illness within 48 hours of his falling ill before the competent railway doctor, who, after examination, is expected to issue necessary sick certificate and thus remained absent from duty in an unauthorised manner. For these acts of misconduct, disciplinary proceedings were initiated against the respondent. The respondent was served with article of charges and Mr. V.S. Chauhan, E.O.S., IPF/CIB/BVP was appointed as inquiry officer. At the inquiry, one Mr. L.N. Gohel, SIPF (R) Coy BVP and Mr. K.L. Chaudhary, DMO-BVP were examined to prove the charges levelled against the respondent. The respondent was given opportunity to cross-examine the witnesses examined by the department and was also afforded opportunity to submit final defence statement. After considering the evidence and defence taken up by the respondent, the inquiry officer concluded that the charges framed against the respondent were proved and submitted his report accordingly to the disciplinary authority. On scrutiny of the said report, the disciplinary authority agreed with the conclusions recorded by the inquiry officer and, therefore, served the notice dated November 14, 1987 calling upon the respondent to show cause as to why penalty of removal from service should not be imposed on him. Along with the said notice, report of the inquiry officer was also sent to the respondent. On receipt of the show cause notice as well as inquiry report, the respondent submitted his reply dated January 9, 1988 and pleaded that for the reasons stated therein the report of

the inquiry officer should not be accepted nor punishment proposed should be inflicted upon him. The disciplinary authority, after considering the defence statement dated January 9, 1988 as well as findings of the inquiry officer, passed order dated March 28, 1988 retiring the respondent compulsorily from service. Thereupon the petitioner preferred an appeal before the Deputy Chief Security Commissioner (RPF), Western Railways, Bombay, as provided by Rule 59 of the Railway Protection Force Rules, 1987 ('the Rules' for short). The appellate authority, after carefully going through the entire proceedings, held that the disciplinary authority had taken a lenient view and no ground to interfere with the order passed by the disciplinary authority was made out by the respondent. The appellate authority, therefore, rejected the appeal. The order passed by the disciplinary authority retiring the respondent compulsorily from service as well as the order passed by the appellate authority rejecting the appeal filed by the respondent were challenged by him in the High Court by way of filing Special Civil Application No.7777 of 1988 under Article 226 of the Constitution. The learned Single Judge concluded that charge No.1 i.e., that the respondent remained absent in an unauthorised manner on April 23, 1987 was not proved but the charge No.2 was proved. On consideration of the facts of the case the learned Single Judge expressed the view that punishment of compulsory retirement from service imposed on the respondent was harsh and disproportionate. Under the circumstances, the learned Single Judge, by the impugned judgment, has set aside the order retiring the respondent compulsorily from service and reinstated him in service with full backwages as well as consequential benefits, subject to minor or petty punishment to be awarded to the respondent by the disciplinary authority within two months from the date of production of certified copy of the judgment. These directions are challenged by the appellants in the present appeal.

3. Mr. Jayant Patel, learned counsel for the appellants, submitted that the respondent having failed to maintain sense of responsibility, discipline and good behaviour, his petition ought to have been rejected by the learned Single Judge. It was maintained that the respondent had committed breach of S.R.2/7 and S.R.2/8 of the Rules governing the issue of medical certificates for leave to Non-Gazetted Railway Servants which are contained in Appendix VI of the Indian Railway Establishment Code, Volume I and, therefore, reinstatement in service with backwages should be set aside by this Court. According to the learned counsel

for the appellants, the respondent had failed to present himself with a certificate in support of his illness within 48 hours of his falling ill before the competent railway doctor, who, after examination, is required to issue necessary sick certificate and, therefore, the lapse on the part of the respondent ought to have been viewed seriously by the learned Single Judge. What was emphasised was that when imposition of minor or petty punishment is left to the disciplinary authority the respondent should not have been reinstated in service with backwages more particularly when he had failed to establish that during the interregnum period he was not gainfully employed and having regard to his past record as mentioned in paragraphs 18 and 19 of the affidavit-in-reply. The learned counsel for the appellants pleaded that the judgment of the learned Single Judge is not sustainable in the eye of law and, therefore, the appeal should be accepted.

4. Mr. R.V. Sampat, learned counsel for the respondent, contended that the disciplinary authority has committed breach of rules 153.1, 153.3.3., 153.4, 153.5, 153.15, 154, 155 as well as 156 of the Rules whereas the appellate authority has committed breach of rule 217 of the Rules and, therefore, the appeal should be dismissed. It was stressed that the learned Single Judge having held that charge No.1 was not proved, was justified in holding that the punishment of compulsory retirement from service imposed on the respondent was harsh as well as disproportionate and, therefore, order reinstating the respondent in service with backwages as well as consequential benefits should be upheld. It was further pleaded on behalf of the respondent that in view of the provisions of rule 155 of the Rules, previous bad record of the respondent should not be taken into consideration while deciding the question whether the respondent is entitled to be reinstated in service with backwages. It was also stressed that the present appellants had failed to comply with the interim order passed in main petition requiring them to reinstate the respondent in service and, therefore, the discretion exercised by the learned Single Judge in awarding backwages should not be interferred with in this appeal. Lastly it was contended that though there is bar to initiate departmental inquiry when an offence as contemplated by Section 17 of the Railway Protection Force Act, 1957 ('the Act' for short) takes place, disciplinary proceedings were initiated against the respondent and as conclusions of the inquiry officer are based on "no evidence" the appeal should be dismissed. In support of his arguments, learned counsel for the respondent relied on: (i) Chandrashanker Chuni

Lal Vyas v. State of Gujarat, 1977 (2) SLR 270, (ii) Bhagat Ram v. State of Himachal Pradesh and others, AIR 1983 SC 454, (iii) R.P. Bhatt v. Union of India and others, AIR 1986 SC 1040, (iv) State of Gujarat and others v. V.M. Thakkar, 1991 (2) GLR 837, (v) Union of India and others v. Giriraj Sharma, AIR 1994 SC 215.

5. We have heard learned counsel for the parties and considered the documents which were produced along with the petition. The points viz., (i) on receipt of the complaint the disciplinary authority had not decided whether it was a case for imposition of major or minor punishment, (ii) list of witnesses by whom the charges were proposed to be sustained was not mentioned in the article of charges, (iii) the respondent was not given opportunity to examine himself nor his statement was recorded by the inquiry officer, (iv) the disciplinary authority had not independently recorded its own findings whether the misconduct was committed or not, (v) whether punishment of compulsory retirement from service was warranted or not and (vi) in determining the punishment the nature of duties expected from the respondent was not considered by the disciplinary authority nor the question whether imposition of punishment was warranted or not, are neither pleaded in the petition nor argued before the learned Single Judge and, therefore, in our opinion, the respondent is not entitled to agitate those points for the first time in the present appeal more particularly in view of the Division Bench decision of this Court in Jenusan Textile v. Rajkot Municipal Corporation, 1991 (1) GLR 460, wherein the Division Bench has examined the scope of Letters Patent Appeal and held that contentions not argued before the learned Single Judge though stated in the memo of petition cannot be allowed to be argued for the first time before the Bench hearing Letters Patent Appeal. The reasons given by the Division Bench as to why contentions not argued before the learned Single Judge should not be allowed to be argued before the Bench hearing Letters Patent Appeal are as under:

> "The learned single Judge is called upon to examine only one or two of the many contentions taken in the memo of the petition. He is invited to render his verdict, not on all the contentions but on only one or two of them. In other words, for the reasons best known to the petitioner or to the counsel, he is indirectly asked not to touch other contentions which are being taken out of the very zone of consideration. The judicial conscience is not only allowed but rather diverted to be focused only one or some of the

> issues. A situation of "non-verdict" on other issues is invited. The L.P.A. Bench thereafter would be called upon to decide certain issues for the first time. The role of a single Judge thus indirectly is being assigned to the Bench which is deprived of the advantage of having the views of the learned Single Judge before it. The entire process of adjudication before the Court in original proceedings would ultimately stand substituted by the appellate proceedings."

In view of the above referred to weighty observations made by the Division Bench in case of Jenusan Textile (supra), learned counsel for the respondent for the first time cannot be permitted to argue those points which are neither pleaded in the petition nor argued before the learned Single Judge. Under the circumstances, we do not propose to go into those points which are raised by the learned counsel for the respondent for the first time in the appeal.

6. The contention that in view of the provisions of Section 17 of the Act read with rule 153.3.3 of the Rules, disciplinary proceedings could not have been initiated against the respondent is devoid of merits. Section 17 of the Act provides for penalties for neglect of duties, etc. The provisions contained in Section 17 of the Act are without prejudice to the provisions contained in Section 9 of the Act. Section 9 of the Act relates to dismissal, removal, etc., of a member of the Force if he is guilty of misconduct. Section 17 of the Act begins with the words "without prejudice to the provisions contained in Section 9" which means that Sections 9 and 17 are mutually exclusive and it is wrong to contend that when a misconduct can be punished by way of imprisonment under Section 17 of the Act, disciplinary proceedings cannot be initiated. What is prohibited by rule 153.3.3 of the Rules is attempt to convert case punishable under Section 16 or Section 17 of the Act into disciplinary cases. Reading the article of charges as well as the defence taken up by the respondent and order passed by the disciplinary authority, it is difficult to conclude that an attempt was made by the appellants to convert case punishable under Section 17 of the Act into a disciplinary case. In the affidavit-in-reply it is rightly asserted on behalf of the appellants that the disciplinary authority had shown leniency to the respondent and instead of prosecuting him for the offence of withdrawing from his duties of his office without permission, disciplinary proceedings were initiated against him. On over all view of the facts of the case,

we are of the opinion that no attempt was ever made by the disciplinary authority to convert a case punishable under Section 17 of the Act into a disciplinary case and, therefore, there being no substance in this contention, the same is hereby rejected.

7. The plea that orders passed by the disciplinary authority as well as by the appellate authority are not supported by reasons and, therefore, the order of imposition of penalty is bad in law has no substance. We may state that before deciding to impose punishment of compulsory retirement from service on the respondent, the disciplinary authority had taken into consideration (i) notice dated December 14, 1987, (ii) findings of the inquiry officer, (iii) his own findings and (iv) defence statement submitted by the respondent on January 9, 1988 and had thereafter concluded that the respondent being incorrigible and charges having been established, punishment of compulsory retirement from service should be imposed on him. Similarly, the order passed by the appellate authority makes it more than clear that the appellate authority had taken into consideration (i) the facts of the case, (ii) charges framed against the respondent, (iii) the evidence led by the department before inquiry officer Mr. Chauhan, (iv) report of the inquiry officer, (v) show cause notice dated December 14, 1987, (v) reply dated January 9, 1988 submitted by the respondent to show cause notice, (vi) order retiring the respondent compulsorily from service, (vii) the contentions which were urged by the respondent in the memo of appeal and (viii) different punishments which could have been imposed for the misconduct committed by the respondent, before dismissing the appeal. Under the circumstances, it is difficult to agree with the submission of the learned counsel for the respondent that neither the order passed by the disciplinary authority nor the order passed by the appellate authority is supported by reasons.

8. Though it was contended that this is a case of "no evidence" and conclusions drawn by the inquiry officer being perverse, the punishment of compulsory retirement from service should have been set aside by the learned Single Judge, we are not inclined to accept this contention because the learned Single Judge has recorded a positive finding of fact that charge No.2 is proved and that finding is not challenged by the respondent by way of appeal before us. Moreover, as observed earlier, witnesses were examined by the department in support of the charges levelled against the respondent and the respondent was permitted to cross-examine those

witnesses. Even documentary evidence was also produced in support of the charges. Therefore, it is not correct to say that this is a case of "no evidence", and therefore, the punishment of compulsory retirement from service is vitiated.

9. Coming to the charges which were framed against the respondent we find that the learned Single Judge has rightly concluded that charge No.1 is not proved but charge No.2 is proved by the department. The respondent had failed to present himself with certificate in support of his illness within 48 hours of his falling ill before the competent railway doctor who was required to examine the respondent and issue necessary sick certificate. Therefore, there is no manner of doubt that the respondent had committed breach of S.R.2/7 of the Rules governing the issue of medical certificate for leave to Non-Gazetted Railway servants which is a misconduct within the meaning of the Rules. However, the record indicates that after his illness was over the respondent had produced certificate from Civil Surgeon, District Civil Hospital, Bhavnagar which was countersigned by the railway doctor and, therefore, in our view, the learned Single Judge was justified in concluding that punishment of compulsory retirement from service imposed on the respondent was harsh and was not warranted in the facts of the case. The decision of the learned Single Judge to leave to the disciplinary authority as to which minor or petty punishment should be imposed on the respondent for his misconduct can hardly be faulted with. However, the grievance made by the appellants that the learned Single Judge should not have directed the appellants to reinstate the respondent in service with backwages is fully justified. Normally, when an employee is ordered to be reinstated in service, he would be entitled to backwages. But before awarding backwages other relevant factors cannot be ignored. In view of the liberty reserved to the disciplinary authority, the disciplinary authority would be justified in imposing any of the minor or petty punishment enumerated in the Rules, on the respondent. The principle of "no work no pay" also deserves consideration. It is not the case of the respondent that he was not gainfully employed from the date of compulsory retirement from service till reinstatement in service. Moreover, by filing affidavit-in-reply the present appellants have pointed out that several punishments, for different kinds of misconducts, were imposed on the respondent from time to time, including for non-performance of duty. Except the punishment stated in paragraph 18 (H) of the affidavit-in-reply which is controverted by the

respondent, it is not his case that other punishments as enumerated in paragraph 18 were not imposed on him. Thus, having regard to the totality of the facts of the case, we are of the opinion that the learned Single Judge has committed error in directing the appellants to reinstate the respondent in service with backwages and, therefore, to that extent the appeal deserves to be allowed.

10. For the foregoing reasons, the appeal partly succeeds. The finding recorded by the learned Single Judge that charge No.2 levelled against the respondent is proved, is hereby confirmed. Similarly, the finding that punishment of compulsory retirement from service imposed on the respondent is disproportionate to the misconduct proved and is harsh, is also confirmed. It is clarified that it would be open to the disciplinary authority, if it so desires, to visit the respondent/ original petitioner with a minor punishment as contemplated by the Rules. If the disciplinary authority is inclined to impose any of the minor punishments, such decision shall be taken by it as early as possible and preferably within three months from the date of receipt of the writ. The order of reinstatement of the respondent in service is confirmed but the direction gi

Judge to the appellants to pay to the respondent backwages is hereby set aside and quashed. We may clarify that the reinstatement of the respondent in service without backwages will be with all consequential other benefits. The appeal accordingly stands disposed of with no orders as to costs.

---

(karan)